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IN THE

Supreme Court of the United States

October Term, 1943.

No. 893.

HELEN VAN ZILE ANTHONY and WILLIAM D. SMITH,

Petitioners,

against

UNITED STATES TRUST COMPANY OF NEW YORK,

Respondent.

Petition for Writ of Certiorari and Brief in Support of Petition.

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THE REPORTER COMPANY, Inc., New York City
1944

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No.

HELEN VAN ZILE ANTHONY and WILLIAM D. SMITH,
Petitioners,
against
UNITED STATES TRUST COMPANY OF NEW YORK,
Respondent.

Petition for Writ of Certiorari.

The petitioners, Helen Van Zile Anthony and William D. Smith, pray that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York entered January 20th, 1944, denying the motion of the petitioners for an order certifying that a constitutional question under the due process provision of the Federal Constitution is directly involved on the appeal taken to that court from the judgment entered on the order of the Appellate Division of the Supreme Court of the State of New York, October 9, 1943, affirming judgments of the Special Term of that court of June 26, 1942, and September 4, 1942, holding that the petitioners' constitutional rights had not been invaded under the due process provision of the Federal Constitution,

and affirming an order denying a motion to dismiss the action made August 15, 1940, and the order of the Court of Appeals of the State of New York made January 27, 1944, dismissing petitioners' appeal on the ground that no constitutional question was directly involved under the due process provision of the Federal Constitution, and to review the judgment of affirmance of the Appellate Division aforesaid.

Opinions Below.

The Special Term rendered an opinion which is unreported and set forth in the record (20-30). The Appellate Division affirmed the judgment without opinion (266 App. Div. 951) and the Court of Appeals rendered no opinion, 292 N. Y. (mem.) 513, 514.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code on the basis that the judgments below were based entirely on a decree of the Surrogate's Court, New York County, made without pleadings, without notice, without a trial and without jurisdiction, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, and based on said decree the judgment adjudicates that the respondent here is the trustee by acquiescence of the petitioners' property and has unlimited right to and did manage the said property, and to impose and did incur expenses thereon without her consent, and divests petitioners of a cause of action for conversion of the property thus burdened which is thus adjudicated, amounting to the taking of petitioners' property without due process of law.

The opinion of the Surrogate on that decree is reported in 173 Misc. 1042. The appeal from the decree taken on procedural grounds was affirmed without opinion, two justices joining in a dissenting opinion, 262 App. Div. 703. An appeal to the Court of Appeals on the same grounds was affirmed without opinion, 287 N. Y. 645 (328-329).

A motion for reargument made on the ground that the petitioners' constitutional rights had been invaded, opposed on the ground that the assertion of a constitutional question on reargument comes too late and that the rules on reargument were not complied with, was denied, 287 N. Y. 754.

Certiorari to this Court, opposed on the ground that a constitutional question raised on reargument in the Court of Appeals is not certiorariable, was denied by this Court, 315 U. S. 822.

The decree is now directly attacked on the appeal from the judgment herein by answer in this action, on the trial and on the appeal.

The application is based on the record heretofore filed in this Court on the prior application for certiorari and on the record herein presented (345).

The references to the Record of Appeal from the Surrogate's decree will be preceded by an "S." The reference in this record omit the "S." If reference is simultaneously made to both records the references to this record precede the references to the Surrogate's decree record.

Question Presented.

Is a judgment adjudicating the rights of the petitioners to an interest in real property, giving the respond-

ent proprietary dominion over said property and the unlimited right to manage the property as trustee by consent, to impose expenses and charge them against the petitioners and allowing charges so made and the right to sell the property all without the consent of the petitioners and depriving the petitioners of their vested right in a cause of action in a pending Supreme Court action of conversion of the property thus burdened based entirely on a decree giving those rights entered and made without trial, pleadings, notice, jurisdiction, and the right to be heard void under the due process provision of the Federal Constitution as a taking of property without due process of law?

Statement.

By the judgment sought to be reviewed there has been imposed on the petitioner Anthony a one-eleventh part of all disbursements resulting in a loss incurred by the respondent Trust Company in managing a parcel of realty taken by it in lieu of foreclosure on which it had previously taken a mortgage of $110,000 and allocated as testamentary trustee a $10,000 participation to a trust for life terminated October 13, 1935, of which the petitioner was remainderman. There has also been imposed by said judgment all such expenses so incurred in perpetuity and all legal expenses of the respondent in depriving the petitioners of a trial, which expenses are made a lien on the participation (52), which participation the petitioners assert had been previously converted by the respondent. The expenses of an accounting proceeding in the action together with the costs of the action are also charged against the petitioners (53, 265-266).

This judgment is based in its entirety on the decree of the Surrogate's Court, New York County, holding

without pleadings and without jurisdiction, without notice and trial as aforesaid, that the petitioner had given the respondent Trust Company plenary power to manage the property by signing a receipt acknowledging the delivery of a certificate of participation (20-30; S. 6-8, 11-14). The petitioner, William D. Smith, has been bereft of a cause of action for conversion of the participation on which respondent imposes a lien for its charges.

The action resulting in such judgment was brought in the Supreme Court, New York County, by the respondent as plaintiff, for a judicial settlement of its account with respect to a $10,000 participation in a mortgage of $110,000 on Madison Avenue premises in New York City and that the plaintiff's charges for advances thereon and the lien of the plaintiff thereof be fixed and that the interest of the petitioners in said premises be defined and alleges that its claim is based on the decree of the Surrogate's Court (5-10). The answer pleads the invalidity of the decree relied on as a basis for the action under the due process provision of the Constitution (11-18). Based on that decree the petitioners were precluded from submitting any evidence to contradict the basic claim of the respondent (100-101, 6, 127, 128, 62, 99, S. 182).

As the petitioners claimed conversion of the participation, they could not consistently offer proof of the affirmative malfeasance of the respondent in the management of the property and of dominion over the petitioners' property (26, 71-72, 215, 224-226). The same position was taken on the accounting (274-278).

On the death of her mother in October, 1935, petitioner Helen Van Zile Anthony, as sole remainderman (58, 18, 226, 240-241) refused the request of the Trust Company for a power of attorney to the respondent Trust Company to manage the

participation here involved and another participation for $4,500 on other real property which the respondent Trust Company had allocated as testamentary trustee under petitioners' grandmother's will to a trust for the life of her mother (S. 96, 138-139, 187, 190-191, 194-195, 149, 113, 121-123, 190-191, 106, 126, 130, 133, 199-201, 178, 216, 234). After such refusal and on the promise and agreement of the Trust Company respondent to deliver to her an assignment of the participation free from any agency on the part of the Trust Company to manage the property the petitioner Anthony signed on May 26, 1933, a receipt and release acknowledging the receipt of said certificates without the actual delivery of them to her (S. 133-149, 154-155, 158, 178). Because she later signed a receipt acknowledging delivery to her of documents enclosed which contained the certificates above described retaining proprietary dominion by the Trust Company over her property contrary to her demand (174-176, S. 202-205) and contrary to the promise and agreement of the Trust Company, without then discovering the deception, petitioner Anthony has been charged with repudiating her release, has been denied a trial under the due process provision under the Federal Constitution, her $10,000 confiscated, and has been compelled to pay, and will be compelled to pay perennially onerous charges of the Trust Company imposed on this certificate.

On discovery of the deception the petitioner, Anthony, repudiated the receipt and release and demanded her property (284, 301-302, 174-177, S. 170-171). In the course of lengthy negotiations looking to an adjustment, the respondent Trust Company paid the $4,500 participation in full with interest (164, 158, 191, 202, 284, S. 105, 170-171). On refusal of the Trust Company to pay the second participation, in November, 1939, an action was brought in the Supreme Court, New York County,

by the petitioner William D. Smith as assignee of the petitioner Helen Van Zile Anthony, for the conversion of the participation herein involved (S. 223-231), in which action this respondent served an answer admitting that the said petitioners refused its request for a power of attorney to manage the participation and that the receipt and release had been conditionally delivered and as separate defenses it pleaded release, account stated and the statute of frauds (S. 233-238).

Although on motions made by it in this Supreme Court action the respondent admitted that the entire former trust fund had been delivered and accepted with the exception of the participation in issue in the action (S. 131, 242, 250-254), the respondent brought a proceeding in the Surrogate's Court, New York County, asking that the validity of the release which it had put in issue in the Supreme Court action be determined (S. 237-238, 23) and in the event that the release be declared invalid that its account be judicially settled (23).

These petitioners filed an answer to the Surrogate's proceeding demanding a dismissal on the ground that there was no subject-matter extant upon which the Surrogate could exercise jurisdiction (S. 71-77).

As the Surrogate's Court had no jurisdiction to try the issues of the Supreme Court action without an order of the Supreme Court directing such a trial, the Trust Company, respondent here, moved for such an order (154-179). While this motion was still pending and undetermined, the Trust Company served notice of hearing ostensibly on the issues set forth in petitioners' answer demanding a dismissal of the proceeding. It is uncontradicted that respondent had previously announced that this issue only would be brought on for hearing (288-289, 301-302). Although the petitioners uncontradictedly announced that the hearing was limited to the trial of is-

sues set forth in the answer demanding a dismissal of the proceeding (S. 80, 82-83, 86, 87-89, 110, 111), the Trust Company, with the acquiescence of the Surrogate, proceeded to try all the issues under the pleadings in the Supreme Court action not in issue on this hearing over the objection of these petitioners (S. 97, 100, 110-121) and also proceeded to prove its account deferred by its own petition until after the decree if ever was determined invalid (S. 23). The petitioners were directed on that hearing to submit any proof to the contrary under the pleadings in the Supreme Court action without notice and without a trial (S. 110-111).

The decree decides all the issues in the Supreme Court action as to all occurrences to June 8, 1936, the date upon which the Surrogate held that the participation certificates had been delivered (S. 264, 159-163). The Surrogate further held that the Trust Company after June 8, 1936, was custodian and not trustee of the participation with all the arrogated powers previously described (S. 6-7, 13-14, 84, 85, 102, 103, 112, 113).

This action was brought immediately after the entry of the decree by the Surrogate on the ground that the Surrogate had no jurisdiction to adjudicate the rights of the petitioners with reference to the participation certificate although he had decreed that the Trust Company had plenary authority to manage the property.

The decision of the Special Term is predicated entirely on the decree adjudging the authority of the Trust Company under the certificate of participation (318-325).

After the decree was entered and after this action was brought, the Trust Company, in an informal letter to the Judge, withdrew its motion to transfer the trial of the Supreme Court action to the Surrogate's Court (1, 180-181, 186). The additional facts set forth in the accompanying brief are hereby made part of this petition.

Specification of Error.

The judgment herein is void in that the decision and decree of the Surrogate's Court upon which it is based were rendered on issues not within and not responsive to the pleadings before that Court and not litigated and were made without any pleadings upon which to base them and upon pleadings in an action pending in the Supreme Court, New York County, and are, therefore, void under the due process provision of the United States Constitution.

2. The judgment herein is void in that it is predicated and based entirely upon the aforesaid described decree in that the petitioners were deprived of any trial framed by the pleadings in the Supreme Court action and without notice were deprived of their property contrary to the due process provision of the Constitution of the United States.

3. The judgment herein is void in that it is based on the decree aforesaid and by such decree the petitioners herein were deprived of their vested right in the cause of action set forth in the action pending in the Supreme Court for conversion of the very property on which charges are made against petitioners.

4. The judgment herein is void in that it is based upon a decree of the Surrogate's Court made without jurisdiction.

Reasons for Granting the Writ.

The petitioners herein have been held to be owners of a participation which they allege was converted by the respondent and without a trial, pleadings or jurisdiction as aforesaid, have been held to be *cestuis qui trust* of the respondent and the respondent has been given plenary

power to deal with the property in perpetuity to incur and has incurred expenses thereon and to impose and has imposed them on the petitioners at their own will subject only to actual malfeasance, and in the exercise of such power has done so, all of which constitutes a depriviation of the petitioners' property without due process of law.

Dated, New York, March 30, 1944.

Respectfully submitted,

ELI J. BLAIR,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITIONERS FOR CERTIORARI.

I.

This Court has authority and power to entertain this application.

The Appellate Division of the New York Supreme Court unanimously affirmed the judgment sought to be reviewed without opinion. Pursuant to Section 588, subdivision 1 (a) of the Civil Practice Act, petitioners appealed to the Court of Appeals as of right on the ground that a Federal constitutional question is directly involved (311-313).

After the appeal was so taken, petitioners made an application in the Court of Appeals under Section 593 of the New York Civil Practice Act for an order certifying that a constitutional question is directly involved under the due process provision of the Federal Constitution (315-336). The Court of Appeals denied the motion (344-345). The Court of Appeals simultaneously granted respondent's motion to dismiss the appeal on the ground that no undertaking to perfect the appeal had been filed (336-340). When the petitioners by motion, called attention of the Court to the law providing that no such undertaking is required when a constitutional question is involved and that the petitioners were not in default until that question was decided, the Court resettled its order and dismissed the appeal on the ground that no constitutional question is involved (341-344). As petitioners rely solely on the Federal constitutional rights, these orders finally determined the action.

In *Southern Electric Co. v. Stoddard,* 269 U. S. 186, Chief Justice Taft points out that on affirmance by the Appellate Division an appeal lies of right to the Court of Appeals. The appeal here was so taken.

The Court of Appeals, having dismissed the appeal for want of a constitutional question, the only question involved, no application, of course, lied for leave to appeal to that Court under Section 592, subdivisions 3 and 5.

Section 593, as amended and added by Chapter 297 of the Laws of 1942, provides that after an appeal is taken to the Court of Appeals, as a matter of right an application can be made to the Court of Appeals for an order certifying that a constitutional question is directly involved under the Constitution of the United States as provided in Section 588, subdivision 1 (a) of the New York Civil Practice Act.

Prior to 1942, this application was made to a Judge of the Court of Appeals.

Wielesthier v. Lafayette Ins. Co., 265 N. Y. 291.

The motion is now made to the full court. This was done here and the constitutional right denied. The Court dismissed the appeal on the denial of the constitutional right invoked. Therefore, a decision has been rendered "by the highest court of a state in which a decision could be had."

Tumey v. Ohio, 273 U. S. 510, 515.
Chesapeake & Ohio Rwy. Co. v. Mihas, 280 U. S. 102, 104.
Minneapolis, St. P. & S. S. M. Rwy. Co. v. Rock, 279 U. S. 410.

II.

The judgment herein is void because the decision and decree of the Surrogate upon which it is based were rendered on issues not within and not responsive to the pleadings before that Court and not litigated and were made without any pleadings upon which to base them and upon pleadings in an action pending in the New York Supreme Court are therefore void under the due process provision of the United States Constitution.

Coe v. Armour Fertilizer Works, 237 U. S. 413, 419, 426.
Reynolds v. Stockton, 140 U. S. 254, 264, 265, 268.
Windsor v. McVeigh, 93 U. S. 274, 282.
Standard Oil Company v. Missouri, 224 U. S. 270, 281-282.
Brinkerhoff-Faris Co. v. Hall, 281 U. S. 673, 678-680.
U. S. v. Goldstein, 271 Fed. 838, 845.
In re Conservative Mortgage & Guaranty Co., 24 Fed. (2) 38, 41.
Clark v. Arizona Mut. Savings & Loan Ass'n, 217 Fed. 640, 642-644, aff'd 220 Fed. 1, 6, Certiorari denied 238 U. S. 628.
Osage Oil Refining Co. v. Continental Oil Co., 34 Fed. (2nd) 585, 588, Certiorari denied 287 U. S. 616.
J. P. Jorgenson Co. v. Rapp, et al., 157 Fed. 732.
Clapp v. McCabe, 84 Hun 379, affirmed 155 N. Y. 525.
Allen v. Farmers Loan & Trust Co., 18 App. Div. 27, 33-34.

The denial of certiorari on some of the questions here urged is no bar to this contention. The Court undoubtedly based the denial on the ground that a constitutional question cannot be raised for the first time on reargument. The Court has expressly held that denial of certiorari is not *res adjudicata*.

Atlantic Coast Line R. Co. v. Towe, 283 U. S. 401, 403-404.

The former record did not contain all the evidentiary evidence contained in this record (R. 154-230).

The decree being void, petitioners are free to attack its validity.

We have demonstrated in minute detail on the application to the Court of Appeals to certify the existence of a constitutional question that the judgment here is based entirely on the decree (318-325). No affidavit was filed in opposition. Hence, it is admitted.

The invalidity of the decree upon which the judgment here is based is thus squarely presented on this appeal.

In *Coe v. Armour Fertilizer Works*, 237 U. S. 413 (*supra*), an execution was issued against the property of the plaintiff in error, pursuant to a Florida statute, without pleadings and without trial on the ground that he was a stockholder whose stock was not paid for, and an execution against the corporation had been returned unsatisfied. The Court said at page 419:

> "It would seem plain that any course of procedure having for its object the taking of property to satisfy an alleged legal obligation, and which yet accorded no hearing to a respectful protest invoking on reasonable grounds a prohibition found in the supreme law of the land, could itself hardly be termed 'due process of law.'"

The Court further said at page 426:

> "For in this case there was no pending action or issue; plaintiff in error came into court to object, on jurisdictional grounds, to the execution of final process upon his property. And the effect of the decision under review was to convert his petition which simply raised an issue of law under the state constitution and the Fourteenth Amendment into a tender of an issue of fact respecting his status as a stockholder and the amount of his unpaid subscription, if any, and then to

> hold him concluded upon the latter issue for failure to introduce evidence bearing upon it. In doing this, the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this, without his consent—and the record shows no consent—is contrary to fundamental principles of justice. *Reynolds v. Stockton*, 140 U. S. 254, 268, 269."

The ruling is particularly applicable here. The petitioners here came into court to object that there was no justiciable issue presented in the Surrogate's proceeding. The effect of the decision was to convert petitioners' answer, which simply raised an issue of law, into a tender of an issue of fact relating to all the issues in the Supreme Court action which were not at issue in this proceeding, and to hold these petitioners concluded by these findings. In so doing here the Surrogate rendered judgment upon a matter that was not within the pleadings, and which was not in fact litigated. To do this is contrary to fundamental principles of justice.

In *Reynolds v. Stockton*, 140 U. S. 254 (*supra*), cited in the above authority, an action was brought in New Jersey on a judgment recovered in New York. The New York judgment had been made contrary to the allegations set forth in the pleadings. The Court, in its opening sentence there, said at page 264:

> "We are of opinion that the decision of the Chancery Court of New Jersey, as sustained by the Court of Errors and Appeals of that State, is correct, and must be affirmed. The first and obvious reason is that the judgment of the Supreme Court of New York was not responsive to the issues presented."

The Court further said at page 265:

> "Take an extreme case: Given a court of general jurisdiction, over actions in ejectment as

> well as those in replevin; a complaint in replevin for the possession of certain specific property, personal service upon the defendant, appearance and answer denying title; could (there being no subsequent appearance of the defendant and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not; even in the courts of the same State. If not there, the constitutional provision quoted gives no greater force to the same record in another State."

The ruling is applicable here. On an answer addressed to the absence of any adjudgeable issue in the Surrogate's Court, findings are made in an action for conversion. The Court made the following pertinent ruling, which is applicable here (p. 265):

> "The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted."

The Court in its summary fully sustained petitioners' violated constitutional rights here asserted, quoting from the opinion of the New Jersey Court of Errors and Appeals, saying (p. 268):

> "Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issues. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions es-

> tablished by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. 'Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests, which they choose to draw in question, that a power of judicial decision arises.' And again: 'A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated * * *.'"

In *Standard Oil Company v. Missouri*, 224 U. S. 270 (*supra*), the Court held that even assuming the Surrogate here had jurisdiction over the subject-matter of the proceeding, he could make no decision beyond the scope of the pleadings. The Court said at pages 281-282:

> "For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based."

Quoting from *Windsor v. McVeigh*, 93 U. S. 274, 282, the Court continued:

> "Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It

> must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of the contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will * * *. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.' *Windsor v. McVeigh,* 93 U. S. 274, 282. See also *Reynolds v. Stockton,* 140 U. S. 254, 265-268; *Barnes v. Railway,* 122 U. S. 1, 14."

The Court would undoubtedly have added if the question was presented that when a pleading is addressed solely to the absence of any triable issue demanding a dismissal of the proceedings on the facts pleaded that a Surrogate cannot try all the issues in a conversion action pending in another court under the pleadings in that action.

In *re Conservative Mortgage & Guaranty Co.,* 24 Fed. (2nd) 38 (*supra*), the Sixth Circuit Court of Appeals again assuming that the Court had jurisdiction held that it must make a decree or judgment solely within the confines of the pleadings, and said at page 41:

> "Assuming, for the purposes of this opinion, that the municipal court might, were its powers duly invoked, exercise all the powers of a court of common pleas in respect to a general creditors' bill for the administration of a judgment-debtor's estate, yet the question whether jurisdiction other than in aid of the judgment-creditor's execution existed, must be determined by the pleadings there-

in. Mere possession of such power is not of consequence, unless the power is properly invoked; not by the court on its own motion, but by some act of the suitor concerned, and in some mode recognized by law. Freeman on Judgment, Sec. 338. 'In the absence of statute to the contrary, it is a general rule that the relief to be awarded by a judgment is limited to that sought by the pleadings, or incidental to such relief. * * * The right to recover depends not upon the prayer, but upon the scope of the pleadings and the issues made or which might have been made under them. A material variance between the relief sought and that awarded is fatal to the judgment. * * *' 33 Corp. Jur., p. 1144, Sec. 88; *id.* p. 1072, Sec. 34; *Standard Oil Co. v. Missouri,* 224 U. S. 270, 32 S. Ct. 406, 56 L. Ed. 760, Ann. Cas. 1913D, 936."

In *U. S. v. Goldstein,* 271 Fed. 838, 845 (*supra*), the Eighth Circuit Court of Appeals said:

> "A judgment upon a matter not within the pleadings and not litigated is void, being contrary to fundamental principles of justice. *Reynolds v. Stockton,* 140 U. S. 254, 11 Supp. Ct. 773, 35 L. Ed. 464; *Coe v. Armour Fertilizer Works,* 237 U. S. 413, 426, 35 Sup. Ct. 625, 59 L. Ed. 1027. 'A decree has to be founded on the *allegata* as well as *probata* of the case.' *Putnam v. Day,* 89 U. S. (22 Wall.) 60, 66 (22 L. Ed. 764); *Hendryx v. Perkins,* 114 Fed. 801, 806, 52 C. C. A. 435."

Here the decree was neither *secundum allegata neque probata.*

Jorgenson Co. v. Rapp, 157 Fed. 732, *supra,* is particularly applicable. In an action for replevin of logs defendants claimed title by abandonment. A counterclaim by the defendants for services rendered in recovering the logs while adrift in the water was stricken therefrom on motion. On the trial plaintiff recovered on its replevin. Without pleadings, as here, defendants were al-

lowed to prove and recovered a judgment on their counterclaim for their services in recovering the logs while adrift.

Two motions to set aside a judgment for the defendants on this counterclaim on the ground that the counterclaim had been stricken out from the answer and the judgment had been made without pleadings and plaintiff could not anticipate and prepare to meet the proof on this counterclaim, were denied. This is the position taken here by the petitioners from the very outset.

On appeal in an action for an injunction to set aside the judgment as null and void on the grounds aforesaid, plaintiff prevailed.

The Court relied on the quotation made here from *Reynolds v. Stockton,* 140 U. S. 254 (p. 8).

In *Clapp v. McCabe,* 84 Hun 379, 383, 387-390, aff'd 155 N. Y. 525, the Court at General Term expressly held that a decree made outside of the issues set forth in the pleadings is contrary to the due process provision of the Federal Constitution (p. 389). Mr. Justice Brown said:

> "It is not sufficient that a judgment is within the general power of the court or that it adjudicates upon a matter of which the court has general jurisdiction. It must appear that the proceeding in which it was rendered was one that brought the power of the court into action. If a woman should sue her husband upon a promissory note, and upon default of answer the court should grant her a divorce, no one would claim that such a judgment had any force or validity, and yet it could be argued that the court had jurisdiction of divorces and the judgment was within its general powers. But the answer to such an argument would be that the power of the court to grant a divorce had not been called into action and no

case had been presented in which it could lawfully be exercised, and the judgment of divorce would be absolutely void. The result would be the same if, in an action upon a note, a judgment was rendered foreclosing a mortgage.

"The rule could not be otherwise without violating the constitutional provision declaring that no person shall be deprived of life, liberty or property without due process of law. That provision cannot be complied with unless the party proceeded against has a hearing or an opportunity to be heard. In *Stuart v. Palmer* (74 N. Y. 183), the Court of Appeals said they could not conceive of due process of law without that.

"A party could not have an opportunity for a hearing upon a claim not set out in the complaint and of which he had no notice. He has a right to rely upon the allegations of the complaint served upon him with perfect confidence that no valid judgment can be rendered against him upon any claim or cause of action which has not been pleaded, and, if any such is rendered, it is *coram non judice* and void."

This decision was relied on in *Matter of Miller,* 257 N. Y. 349, 356, later cited by us.

That the decree herein attacked was made on issues not set forth in the pleadings is too obvious for discussion. The answer interposed by these petitioners demands the dismissal of the proceeding and not an adjudication of the matters set forth in the petition.

The demand is based on the allegation that:

1. The payments referred to in the petition referred to payments after the trust ended and under an agreement between the trust company and the petitioner Anthony, free from the trust relation, all of which payments have been admittedly received except the participation here involved and concerning which a prior action is pending (S. 71-73).

2. The rights of the parties are merged in the agreement of May 26, 1936 (S. 75) preceded by a recital of the facts upon which that conclusion of fact is based (S. 73-75), and that all payments set forth in the account referred to payments made under the agreement (S. 75).

3. A prior action is pending between the parties on which all issues with relation to the $10,000 participation are determinable and the defense asserted and put in issue by the trust company (S. 75-77).

It is self-demonstrated that the only issue triable under the issue joined by this pleading was whether the proceeding should be dismissed on proof of the facts set forth in the answer. Instead of trying that issue the decree decides all the issues in the Supreme Court trial action under the pleadings in that action. We can conceive of no greater and more flagrant violation of due process.

The filing of this answer was in conformity with proper practice to settle the question of whether there was any triable issue to be had in the Surrogate's Court on the facts presented.

Matter of Kelly v. Langevin, 153 App. Div. 322, 323.
Matter of DePierris, 79 Hun 279.
Matter of Andrews, 172 Misc. 373.
Matter of Kirkman, 143 Misc. 342, 343.
Matter of Hearn, 158 Misc. 371, 372.

Petitioners on the hearing adhered strictly in their proof to the allegations set forth in their answer (328, S. 110, 121-132, 187-262).

No issue can be raised with reference to the merits of the matters set forth in the petition and account until after the jurisdictional issue is decided. In the event

of an adverse decision on the issue of jurisdiction, the items of the account are put in issue by filing objections to the petition and account. The petition and account and objections thereupon constitute the pleadings similar to a complaint and answer and define and limit the issues to the merits of the account.

Matter of Doelger, 254 App. Div. 178, 182, aff'd 279 N. Y. 646.
Rule XI, N. Y. County Surrogates' Rules.

No objections could be filed here for the following reasons:

(1) The settlement of the account was indefinitely deferred until after the alleged release was, if ever, declared invalid, hence no objections could be filed until that time (S. 23), and no objections could be filed to the participation because the Trust Company maintained it still held it contrary to its assignment (S. 137, 139).

(2) The filing of objections would have been inconsistent with the basic claim that no accounting was necessary, and that the Surrogate's Court had no jurisdiction of any subject-matter, as it would have been an anomaly to set up this basic issue and proceed to a trial of the very issues which these petitioners contended were triable by a jury in the prior action. The simultaneous filing of an answer attacking the jurisdiction and an answer putting in issue the merits of the petition and account filed would have been tantamount to the simultaneous filing of a demurrer to a bill of complaint, and an answer to the merits of the same complaint.

(3) A prior action was pending in which all the issues between the parties were determinable, and which are not determinable in the Surrogate's Court, as the Surrogate ruled (S. 14).

Farmers' Loan & Trust Company v. Lake St. R. D. Co., 177 U. S. 51, 61.

Colson v. Pelgram, 259 N. Y. 370, 374, 375.
Ludwig v. Baumgart, 48 App. Div. 613.

(4) The Surrogate had no jurisdiction to try the issues in the Supreme Court action until the Supreme Court so ordered.

III.

The judgment herein is void because by the decree upon which it is based, the petitioners were deprived of any trial of the issues framed by the pleadings in the original Supreme Court action and without notice were deprived of their property, contrary to the due process of law provision of the Constitution of the United States.

Frank v. Mangum, 237 U. S. 309, 326.
Palko v. Connecticut, 302 U. S. 319, 327.
Ohio Tel. Co. v. Commission, 301 U. S. 292, 304-305.
Truax v. Corrigan, 257 U. S. 312, 322.
Saunders v. Shaw, 244 U. S. 317.
Georgia Ry. & El. Co. v. Decatur, 295 U. S. 165, 171.
Jensen v. Union Pac. Ry. Co., 6 Utah 253 (4 L. R. A. 724).
Windsor v. McVeigh, 93 U. S. 274, 277.
Stuart v. Palmer, 74 N. Y. 183, 191.
Brinkerhoff-Faris Co. v. Hall, 281 U. S. 673.

The invasion of due process here is augmented and aggravated by the undenied statement of the respondent Trust Company that it would bring on for hearing the issues set forth in the petitioners' answer in the Surrogate's Court (288-289, 301-302), thereby excluding the intention to try the issues in the Supreme Court action. It is further augmented and aggravated by the prayer of the Trust Company's petition in the Surrogate's

Court asking for an accounting only after and in the event the release was declared invalid (S. 23).

The Trust Company further knew that the petitioners here were entitled to a jury trial of the original action (160). It knew that the petitioners intended to demand a jury trial when it made the motion to transfer the action to the Surrogate's Court (165, 167-168, 170, 179. The Trust Company admitted that the entire estate had been distributed except the participation of which a prior action was pending (S. 242). Its reply affidavit served to these petitioners' answer in the Surrogate's Court also admits it (S. 78-79). It was admitted at the opening of the Surrogate's Court herein (S. 82-83). It was reiterated on the hearing (S. 86-87). It was stipulated at the request of the Trust Company on the hearing (102-103). It was admitted that the income due the life tenant had been fully paid (75). Therefore the respondent Trust Company is estopped to gainsay the contention here made.

At the opening of the hearing in the Surrogate's Court on April 12 1940 (S. 4, 80) petitioners uncontradictedly announced that the hearing was limited to the trial of the issues set forth in the answer demanding a dismissal of the proceeding (S. 82-83, 86, 87-89, 110-111) and delivered a trial memorandum to the Surrogate, and a copy to the Trust Company (S. 85) limited to a discussion of the issues raised by their answer.

Over the objection of the petitioners (S. 97, 100, 110-111), although deprived of the right to fully set forth their position and objection on the record (S. 110-121) the Court proceeded to hear and determine all the issues in the Supreme Court action.

The Surrogate summarily directed that the issues of the conversion action be presented by petitioners on that hearing (S. 110, 130-131), and proceeded to receive the

ex parte evidence of the Trust Company without notice and without pleadings (S. 110, 130-131). No notice was given that the application to dismiss on the ground that a prior action was pending, and the trial of the issues of the Supreme Court action would be heard and decided simultaneously (S. 268-269, 264, 267-268), and on the express direction of the Court the petitioners were deprived of any notice. No notice was given that a jury trial, to which the petitioners were entitled under the positive law of the State would be denied (S. 265-266).

Without a trial and without evidence they were charged with repudiation of their alleged agreement in issue in the prior action (S. 8, 86, 90-91, 94-96, 108-113, 116-117, 119-121, 130-131, 265).

In *Truax v. Corrigan*, 257 U. S. 312, 302 (*supra*), the Court said:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

The Surrogate by his direction to the Trust Company to advise the Supreme Court *ex parte*, to decide the motion still pending to transfer the action in the manner directed by him and later ignoring the motion entirely, and consolidating the hearing to dismiss with the issues in a prior action impromptu and after the hearings (S. 112, 127-128, 132, 267-268) clearly violated the due process provision of the Constitution to these defendants. The petitioners were thereby deprived of any notice of the trial of the issues of the Supreme Court action, and stripped of the right to submit their evidence. To in-

stantaneously consolidate a conversation action at law on that hearing with the application to dismiss without notice, was the denial of a trial assured to every litigant by the Fourteenth Amendment.

In *Palko v. Connecticut*, 302 U. S. 319, 327 (*supra*), Mr. Justice Cardozo said:

> "The hearing, moreover, must be a real one, not a sham or a pretense. *Moore v. Dempsey*, 261 U. S. 86; *Mooney v. Holohan*, 294 U. S. 103."

In *Ohio Tel. Co. v. Commission*, 301 U. S. 292, 304-305 (*supra*), Mr. Justice Cardozo wrote that the right to a fair hearing "is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimum requirement."

In *Jensen v. Union Pacific Ry. Co.*, 6 Utah 253 (4 L. R. A. 724) (*supra*), the Court held that:

Due process of law means "that a party should have his day in court—a trial; which means the right of each party, plaintiff and defendant, to introduce evidence to establish his right to recover on the one hand, and to establish his defense on the part of the other; after which comes judgment. Any judgment which is rendered without these modes of procedure, or in disregard of them, is not 'due process of law.' Any other procedure condemns before it hears, does not proceed upon inquiry, but renders judgment before trial."

In *Stuart v. Palmer*, 74 N. Y. 183 (*supra*) (cited in *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 424; *Wuchter v. Pizzutti*, 276 U. S. 13, 24, 25), the Court, summarizing the definition of due process of law under the Federal Constitution, said at page 191:

> "It may however be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the

> citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law without this."

In *Windsor v. McVeigh*, 93 U. S. 274 (*supra*), an answer and claim filed to a proceeding to confiscate the defendant's property were stricken from the file and his property was confiscated. Here the same result was accomplished. The Surrogate, ignoring the issue presented, decided the issues in an action in another court without notice and without jurisdiction, and thereby one-quarter of remainderman's inheritance (S. 64) was confiscated.

The Court held that there could be no judgment without a proper trial. The Court approving of the statement by Mr. Justice Swayne, quoted in the opinion, that sanctioning such a procedure would be a blot upon our jurisprudence and civilization, and contrary to the first principles of social compact and of the right administration of justice, said, referring to this quotation (p. 277):

> "The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

And further:

> "It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

The notice which a party must receive must be an adequate notice clearly apprising the other party of the issues to be tried and limited to the pleadings.

In *Standard Oil Co. v. Missouri*, 224 U. S. 270, the Court said, referring to the proceedings in the State Trial Court:

> "2. The Federal question is whether, in that court, with such jurisdiction, the defendants were denied due process of law. Under the Fourteenth Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and the hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice. For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based.
>
> "'Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. * * * The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.' *Windsor v. McVeigh*, 93 U. S. 274, 282. See also *Reynolds v.*

Stockton, 140 U. S. 254, 265-268; *Barnes v. Railway*, 122 U. S. 1, 14.

"The defendants claim that the present case is within this principle—that the judgment for a fine of $50,000—which some of the Missouri court thought should have been a million dollars—was not only a criminal sentence in a civil suit, but beyond the issues and the prayer for relief in the Information—and therefore void as having been in substance entered without notice and opportunity to be heard."

The contention of these petitioners that they have never had a trial of the issues so ruthlessly and irrevocably decided against them, has never been answered. The faint attempt of the Trial Court here to answer the contention is not an answer. It was ruled that the proceedings in the Surrogate's Court was regularly brought on for hearing and resulted in a decree adjudging the validity of the release and settling the accounting (21-22) and the statement that the issues raised in the Smith action (conversion action) were presented to the Surrogate and the Surrogate said, "I am going to decide them as I have a right to do." The Court then adds, "so you did have a trial" (126).

This ruling ignores the constitutional right of the petitioners to "an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard, is absolutely essential. We cannot conceive of due process of law without this." It ignores the fundamental right to a trial on proper pleadings and an opportunity to present the evidence thereunder. The Trial Court then cites *Baldwin v. Traveling Men's Ass'n*, 283 U. S. 522 (25). That case was based on a judgment of a state court in which an application had been made to vacate service of process on the ground that the defendant had not been

served. That question had been fully litigated, and passed upon in the state court, and decided against the defendant. The Court in the action, based upon that judgment, held that the defendant could not relitigate the question in an action on the judgment. These petitioners never had a trial.

In *Saunders v. Shaw*, 244 U. S. 317 *(supra)*, the Court held that it was a violation of the due process clause of the Constitution to deny a party the right to present his evidence in a state court on one issue on which the plaintiff's evidence was presented, and later ruled inadmissible, and upon which evidence the Appellate Court based its reversal on the ground that the evidence rejected by the Trial Court was admissible. Here petitioners have been deprived the right to submit evidence on all the issues.

In *Georgia Railway Company & El. Co. v. Decatur*, 295 U. S. 165, 171 *(supra)*, the Court held that the refusal of a state court to admit in defense of a suit to collect a tax any evidence tending to prove that no benefit resulted on the ground that such evidence was immaterial, amounts to a denial of a hearing on that issue, and violates the due process clause of the Fourteenth Amendment.

That evidence was offered under proper pleadings. Here petitioners were ordered extempore to produce their evidence under the pleading in another action not in issue under the pleadings on that hearing and made findings without any trial to these petitioners.

IV.

By the judgment based on the decree the petitioners were deprived of their vested right in the cause of action set forth in the action pending in the Supreme Court.

Forbes Boat Line v. Board of Commissioners, 258 U. S. 338, 340.
Steamship Co. v. Joliffe, 2 Wall. (69 U. S.) 450, 457-458.
Osborn v. Nicholson, 13 Wall. (80 U. S.) 654.
Fitzgerald v. Weiderbeck, 76 Fed. 695.
Eltor v. Tocoma, 228 U. S. 148.
Jacobus v. Colgate, 217 N. Y. 235 (241-242).

The denial of the vested right need not be by legislation but may be as here by judicial fiat.

Saunders v. Shaw, 244 U. S. 317, 320.
International Steel Co. v. Surety Co., 297 U. S. 657.
Georgia Ry. & El. Co. v. Decatur, 295 U. S. 165, 171.
Jacobsen v. Jacobsen, 126 Fed. (2nd) 13.
Brinkerhoff-Faris Co. v. Hall, 281 U. S. 673, 680.

The Trust Company proved on the trial of this action that the property involved had been conducted at a loss since the mortgage was taken and the participation thereof allocated to the trust for the petitioner Anthony's mother and that a dummy obligor was designedly placed on the bond (75-78, 93, 94, 96-97, 137-140). The decree made without evidence bars proof on the part of the petitioners to show these identical facts (S. 12, 268) alleged in the complaint in the original action (S. 223-226) and to recover thereon.

The complaint in the original action alleges that these petitioners agreed to take over the participation on the representation that the investment was an excellent one

and the mortgage would be paid when due and the falsity thereof (S. 227, 258-259). The decree without evidence finds that no representations were made as alleged in the complaint and bill of particulars (S. 109-113). On this trial the Trust Company's witnesses proved that the property had been conducted at a loss since the present owner acquired the property (89-90) and it is proven that the mortgage and participations were issued at the time that the new owner acquired the property (108, 88-92, 147-150, 137, S. 169, 150-151), and petitioners are barred to recover therefor.

The original complaint alleges the unlawful reduction of interest (S. 227, 229-230). The decree finds against this contention as to interest prior to June 8, 1936 (S. 11, 12, 13, 38). The petitioners here have been deprived of the right by these findings to prove these allegations as a constituent part and as elements of the conversion in the original action.

The original complaint alleges that the document of May 26, 1936, was signed on the condition precedent that it would not be effective until an unqualified assignment was delivered to the remaindermen and upon the representations aforesaid and that on the contrary a delivery of the certificate above described was made (228) which is the basis of this judgment. The decree adjudges the release is binding to June 8, 1936, when the receipt for the securities was signed (S. 228, 235, 7-8, 11-13, 267). These petitioners were also barred by this decree from showing the facts and circumstances under which the receipt was signed and the facts showing its rejection when the deception was discovered (129, S. 13). The issue with regard to the release is disposed of by the decree and by the judgment here, by the finding that the said document of May 26, 1936, is binding upon the petitioners by the receipt of June 8, 1936, and

by the finding on this judgment that petitioners are bound by the authority set forth in the certificate (26, S. 7-8, 11-12).

Based on this decree the original conversion action was stayed (187-207). Based on this decree the Court denied these petitioners' motion to dismiss this action (278-306).

The cumulative effect of these findings is that the petitioners are perpetually bound by the authority decreed to have been given the Trust Company in the participation, leaving as the only issue the malfeasance of the Trust Company in making disbursements in managing the property (24, 25-27). The petitioners are compelled in perpetuity to pay legal and other expenses on accountings and other matters on property which the petitioners claim they have been deprived of the right to prove has been converted and which they no longer own (215).

The petitioners took the position on the accounting under the judgment here and asserted that they had no interest in the participation as it was the property of the respondent unlawfully converted (274-278). The referee ruled he was bound by the interlocutory judgment (236-237) which in turn is based on the decree. The petitioners are therefore helpless to protect their rights because of the decree obtained in the manner above demonstrated. The Trust Company further demonstrated that the effect of the decree accords with our contention. It proceeds to set up the decree and the judgment here based thereon as a bar and *res adjudicata* to the issue joined in the conversion action and prematurely asks a stipulation of discontinuance of the original action based on the said decree and judgment (331-332).

The petitioner Smith unquestionably had the legal title to the cause of action of the conversion action (240, S. 261-262).

Sheriden v. Mayor, 68 N. Y. 30.
Brown v. Powers, 53 App. Div. 251, 253.
Osborne v. Hughes, 128 App. Div. 128.
Donlin v. Carlow, 120 Misc. 698, 700.
Manderille v. Welch, 5 Wheat. 277, 286.

Ignoring the petitioner Smith and the assignment entirely, the charges of the respondent for legal expenses and its deficit in managing the property are made a lien on the participation and the conversion action is declared to be non-existent without evidence and without a trial (36-37, 51, 52-53, 232-233).

Both off the record and on the record the Special Term declared that it would strip the petitioners of all constitutional questions and prevent them from making an application to this Court (318, 95-96, 6).

We are at a loss to understand the hostility displayed to the claim of the petitioners. If it is because it is speculated that they have attempted to evade a release as they have been so unjustly charged, petitioners still are entitled to a trial on that issue under the Constitution of the United States as written.

Saunders v. Shaw, 244 U. S. 317, 319.

However, the record evidence heretofore produced by the Trust Company indisputably shows that the claim of these petitioners is substantial, if not incontrovertible, on documentary evidence.

After having denied the request of the Trust Company to manage her property and particularly the participation in issue (S. 149, 113, 190-191, 187, 122, 199-201, 178, 216, 234), on the promise and agreement of the Trust Company to deliver to her an assignment of the

participation free from any agency on the part of the Trust Company to manage the property (174, S. 148-149, 153, 154, 150-151, 227, 258-259) Helen Van Zile Anthony signed a receipt and release acknowledging receipt of such certificate without the actual delivery of it to her (S. 137, 139, 133-149). Because she signed a receipt acknowledging delivery to her of documents enclosed which contained a certificate retaining proprietary dominion by the Trust Company over her property, contrary to her demand (174-176, S. 202-205) and the promise and agreement of the trust company without then discovering the deception, Helen Van Zile Anthony has been charged with repudiating her release has been denied a trial under the due process provision of the federal Constitution, her $10,000 confiscated and has been compelled to pay, and will be compelled to pay, onerous charges of the Trust Company imposed on this certificate *ad infinitum*.

We venture to state that if what has been done here constitutes due process, then the Prime Minister of England was woefully mistaken when he said recently at Harvard College that this country, along with his, had common conceptions of what is right and decent, a marked regard for fair play, especially to the weak and poor, and a stern sentiment of impartial justice.

V.

The Surrogate's Court had no jurisdiction of the subject-matter adjudicated by the decree.

The defense that the Surrogate's Court had no jurisdiction of the subject-matter and of the parties, and that its decree is void, may be raised any time, even though not asserted on the hearing, and assuming, although that

fact does not appear, that the petitioners had attempted to litigate the merits of the proceeding.

First National Bank v. Title & Trust Co., 198 U. S. 290.
Rhode Island v. Mass., 12 Peters 657.
Sinsheimer v. Simonson, 107 Fed. 898, 904, affirmed 184 U. S. 18.
O'Donoghue v. Boies, 159 N. Y. 87, 98-101.
Matter of Doeg v. Howland Co., 224 N. Y. 30.
Matter of Heinze, 179 App. Div. 453.
Stevens v. Breen, 258 App. Div. 423, 427.
Fairclough v. Southern Pacific, 171 App. Div. 496, 497, affirmed 219 N. Y. 657.

Section 190a of the Civil Practice Act enacted in conjunction with Section 40, subdivision 9, of the Surrogate's Practice Act, provides that the Supreme Court may transfer an action pending therein to the Surrogate's Court for trial. The transfer shall be effective on the entry of an order of transfer in the County Clerk's office. The Surrogate's Court has no jurisdiction until that time.

Matter of Pfersich, 153 Misc. 609.
Matter of Pedrette, 153 Misc. 106.
Matter of Franklin, 153 Misc. 110.

The Trust Company made such a motion admitting that the Surrogate's Court had no jurisdiction until the order is made thereon and is estopped to espouse a contrary view (154-179). The hearing and decree were had and made while this motion was pending and undecided. More than three months after the decree was made in an informal letter to Levy, J., before whom the motion was still pending and undecided, the Trust Company asked leave to withdraw the motion on the ground that all the issues in the Supreme Court to June 8, 1936, had been decided by the Surrogate (180). The motion to transfer the action was made March 19, 1940 (180). The

hearings in the Surrogate's Court was had on April 12, 1940 (S. 80). The decree was made May 17, 1940 (S. 4). The order withdrawing the motion to transfer the action was made September 26, 1940 (186). However, even if the Surrogate's Court had limited or general jurisdiction of the subject-matter, the decree is void in deciding issues outside of the pleadings and on the pleadings in another action. As previously set forth, the Court, in *Reynolds v. Stockton,* 140 U. S. 254, *supra,* said (p. 268):

> "* * * 'It is impossible to concede that because A and B are parties to a suit a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests, which they choose to draw in question, that a power of judicial decision arises.' And again: 'A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated * * *.'"

In *Standard Oil Co. v. Missouri,* 224 U. S. 270, as we have previously pointed out, the Court held that even assuming that the Surrogate's Court had jurisdiction over the subject-matter of the proceeding, he could make no decision beyond the scope of the pleadings.

In re Conservative Mortgage & Guaranty Co., 24 Fed. (2nd) 38, the 6th Circuit Court of Appeals again assuming that the Court had jurisdiction of the subject-matter, held that it must make a decree or judgment solely within the confines of the pleadings.

The primary issue to be tried was whether Helen Anthony, after the trust ended, agreed that the Trust Company could manage her property in any way it saw fit. Here there was no consent but an emphatic refusal to a request for consent to manage the property (283). Appellants never had a trial to fully so prove.

In *Matter of Miller,* 257 N. Y. 349, the Court held that even a consent decree by a Surrogate's Court without jurisdiction of the subject-matter is void and further held that a judgment must be and was not confined to the issue presented by the pleadings (p. 356). The decree here relied on was not confined to the issue presented by the pleadings.

Even though the Surrogate's Court did have jurisdiction, as we have twice previously pointed out, it had no such right under the due process provision of the United States Constitution to decide the issues in another action under the pleadings thereof.

Referring to an application to try the issues under the pleadings in a Supreme Court jury action upon an accounting proceeding in the Surrogate's Court, made prior to the enactment of Section 40, subdivision 9, of the Surrogate's Practice Act and Section 190a of the Civil Practice Act in 1934, permitting such trial upon an order made by the Supreme Court, the Surrogate, who made the decree herein, then said in *Matter of Harkness,* 119 Misc. 361, 362:

> "There is no authority for the trial of the issues in the Surrogate's Court upon the pleadings in another form" (*sic*).

He also said:

> "He should proceed with his pending action in that court, if he desires a jury trial."

VI.

The application for a writ of certiorari to review the order of the Court of Appeals denying a constitutional question and dismissing the appeal, and the judgment of the Supreme Court, New York County, entered on the order of the Appellate Division, First Department, of the New York Supreme Court should be granted.

Respectfully submitted,

ELI J. BLAIR,
Counsel for Petitioners.

No. 893

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

HELEN VAN ZILE ANTHONY and WILLIAM D. SMITH,
Petitioners.

against

UNITED STATES TRUST COMPANY OF NEW YORK,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

GEORGE L. SHEARER,
M'CREADY SYKES,
Of Counsel for Respondent,
45 Wall Street,
New York 5, New York.

April 25, 1944.

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Opinion below

Opinion of trial court (New York Supreme Court) is not officially reported; it is printed at pages 20-30 of the record. Judgment affirmed by Appellate Division of the Supreme Court without opinion, 266 App. Div. 951. Appeal dismissed without opinion by New York Court of Appeals, 292 N. Y. (Mem.) 513, 514.

(Petitioners have presented on this application the printed record on appeal from the decree of the Surrogate's Court in *Matter of James.* Where parenthetical citation figures are used in this brief, those referring to the Surrogate's Court record are preceded by the letter "S" and indicate page numbers in that record; citations not so designated refer to page numbers of the record in the case at bar).

Foreword

The clearest and most comprehensive judicial statement of all the matters in any way involved in this litigation is found in the decision of Mr. Justice Walter (20-30) on which

the judgment was entered. It needs but the reading of this decision to reveal how utterly fantastic is any claim of denial of constitutional rights, or of any error in the adjudication either in the present action or in the previous proceeding in the Surrogate's Court.

The judgment rendered thereon was unanimously affirmed without opinion by the Appellate Division of the New York Supreme Court (266 App. Div. 951). Petitioners appealed to the New York Court of Appeals, appealing as of right on the claim that a constitutional question was involved (petitioners' brief, p. 11). Petitioners moved in that court for a certificate that a constitutional question was involved, which motion was denied (344-5) and by subsequent order of that court the appeal was dismissed (341). When an appeal taken as of right has been dismissed by the Court of Appeals the New York statute gives the appellant the right to apply nevertheless for permission to appeal (Civil Practice Act, Sec. 592) and if the application be granted the appeal is heard in regular course. No such application was made in the present case.

I

Petitioners have made this application for certiorari without attempting to comply with the indispensable condition that final judgment should have been rendered by the highest state court having jurisdiction to render such judgment or that petitioners should have exhausted their available remedies to obtain such final judgment.

Certiorari is not available until a litigant has done all that can be done in the state courts to avert an unfavorable judgment. He may not split up his contentions and go to the Supreme Court on an alleged constitutional claim until the state courts are through with the case. Obviously a final judgment in his favor on the merits in the state court would make certiorari unnecessary. If, and only if, on such final

judgment the decision is against him the law permits him to ask for a review by certiorari of an alleged denial by the court below of his constitutional rights.

The language of the jurisdictional statute (Judicial Code, Sec. 237, subd. b; U. S. C., Ann., Sec. 344, subd. b) is that certiorari may be granted to review

> "any cause wherein a final judgment or decree has been rendered or passed by the highest Court of a State in which a decision could be had . . . where any . . . right . . . is specially set up or claimed . . . under the constitution."

In the present case no final judgment has been rendered by the highest state court in which a decision could be had.

Petitioners feel aggrieved by the judgment rendered against them at *nisi prius*, by its affirmance by the intermediate appellate court, the Appellate Division of the Supreme Court, the refusal by the court of last resort to certify that a constitutional question is involved and its dismissal of the appeal at that point. As for proceeding on the way to final judgment, that is as far as the petitioners had gone when they sued out their petition for certiorari.

But when the Court of Appeals rendered the decision now sought to be reviewed there still remained open to petitioners the possibility of review by appeal on the merits. The highest court of New York is the Court of Appeals, vested with jurisdiction to review the judgment of the trial court and of the intermediate appellate court. Under the law of New York, that jurisdiction is two-fold; it exists

> 1. As of right (along with other situations not relevant here) where "there be directly involved the construction of the constitution of the state or of the United States" (New York Civil Practice Act, Sec. 588, subd. 1(a); and
>
> 2. By permission of the Appellate Division or of the Court of Appeals, "from a judgment . . . of the Appellate Division . . . which is not appealable

of right only because it does not comply with'' Sec. 588, subd. 1(a), quoted immediately above or with certain other categories similarly permitting appeals as of right (Ib., Sec. 589, subd. 2).

Therefore in order to reach the final judgment rendered by the highest court of the state in which a decision could be had petitioners had two roads open. They might first, if they deemed a constitutional question involved, take their appeal as of right. This they did. The New York statute permits an appellant thus appealing without security to apply to the Court of Appeals for a certificate that a constitutional question is involved and thus to establish by formal pronouncement of the court their standing to appeal as a matter of right. Such an application was made by petitioners, and on its consideration the court decided that no constitutional question was involved and denied the requested certificate (344-5).

This did not advance the case to the stage of final judgment. There still remained open to petitioners the remedy of seeking review of the judgment below by obtaining either from the intermediate court or from the highest court permission to appeal to the Court of Appeals. The New York statute has most carefully preserved to litigants the right first to test the possibilities of appeal as of right without thereby losing the right to seek permission to appeal even if the court holds that there is no appeal as of right. The law expressly provides that the right to apply for permission to appeal survives the dismissal of an appeal taken as of right. Civil Practice Act, Sec. 592, subd. 5(b) provides that throughout the current term at which the appeal mistakenly taken as of right was dismissed or during the next succeeding term application may be made for permission to appeal. Two remedies are thus available to seek review of the judgment by the court of last resort and these remedies are cumulative and not alternative; one by appeal as of right and the other by seeking permission to

appeal.* Until both remedies have been exhausted there has been no final judgment rendered by the highest court of the state in which a decision could be had. Of course if application for permission to appeal had been made and refused, this would have left the record with a final judgment of the highest court in which a decision could be had, but nothing of the sort having been even attempted, the door is not open to certiorari.

This has been so explicitly and repeatedly pointed out by this court that the petition in this case seems inexcusable.

> "It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a state court should be brought here for review either by appeal or certiorari until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted."
>
> Gorman *v.* Washington University, 316 U. S. 98, 100-1;
> Stratton *v.* Stratton, 239 U. S. 55;
> Mullen *v.* Western Union Beet Co., 173 U. S. 116;
> Fisher *v.* Perkins, 122 U. S. 522.

The practical wisdom of this principle is strikingly exemplified here. As the court will see on examination of petitioners' so-called constitutional question, it presents no constitutional question whatever. If petitioners were right in their contention the highest state court could and doubtless would have granted permission to appeal and given them judgment on the law, with no necessity of invoking the constitution. As this court has repeatedly said, it is not to be presumed that a state court would deny permission to appeal in a case where the importance of the principles involved warrant it.

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* Permission to appeal is apparently the most prolific single source of jurisdiction in the Court of Appeals of New York. Examination of the most recent official volume of its decisions (290 New York) shows that out of 231 appeals determined, 81, or more than a third of the whole, were brought up by permission to appeal.

Tunny v. *Ohio*, 273 U. S. 510, 515; *Chesapeake & Ohio Ry. Co.* v. *Mihas*, 280 U. S. 102, 104; and *Minneapolis St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410, cited at end of p. 12 of petitions' brief, are not in point. In none of them was there a statute like the New York Civil Practice Act authorizing appeal on the merits by permission of the court after its dismissal of an appeal mistakenly taken as of right on constitutional grounds. On such an appeal by permission the aggrieved party may succeed in obtaining judgment on the law and facts apart from his constitutional claim, in which case there will be no constitutional question for the Supreme Court to determine. The Supreme Court will not take certiorari on the chance of a constitutional question being ultimately involved, but will withhold consideration of the alleged constitutional question until the final judgment of the state court.

II

No constitutional question is presented

The constitutional right of which petitioners claim to have been deprived by the judgment below is the right to due process of law. Yet the record shows an interlocutory and a final judgment, both rendered in due course, by a court of general jurisdiction, (31-2, 49-53) founded on a complaint (5-10) issue joined by answer (11-19) and a two-days actively contested trial (54-130); things not ordinarily consistent with want of due process of law. It appears, however, that petitioners' real attack is not on the judgment sought to be reviewed, but on a decree rendered in 1940 in another proceeding in another court. Nearly the whole of their long brief is devoted to criticism, not of the judgment in this action but of a decree in another proceeding wherein certiorari was sought and denied by this court two years ago (*Anthony* v. *U. S. Trust Company*, 315 U. S. 822). That was a decree of the New York Surrogate's Court, New York County, part of a similar normal court record, including

petition (S 15-23), appearance and answer (S 71-77), trial in court (S 80-132) and affirmance on appeal (262 App. Div. 703) through the highest court of the state (287 N. Y. 645) and denial by this court of certiorari (315 U. S. 822).

Petitioners, again reiterating in almost identical language that the decree of the Surrogate's Court rendered in 1940 was in some way subject to attack, now declare the present judgment of the Supreme Court "void" because they consider it "based on" or "founded on" the decree of the Surrogate's Court in anothr proceeding; a contention utterly groundless, because the present judgment would have been precisely what it is if the former decree were not in existence.

The petition and brief run to forty pages, yet we fear that even after their prolix presentation this court will have some difficulty in finding what this case is all about. What really happened is as follows:

Helen V. Z. Anthony, one of the petitioners, was remainderman under a testamentary trust which fell in on October 13, 1935 (20). Some months afterwards, the trustee (respondent on this application) presented to her its account of its proceedings (5, 6) with a requested instrument of accounting and release, and after keeping it for five or six months, during which period she employed counsel, she executed and delivered a release accepting and approving the account (20). Some two years and a half thereafter, another of the petitioners, one William D. Smith, began an action against the trustee (*ib.*), alleging that in regard to one particular asset of the trust estate—a mortgage participation which because of its fractional nature could not be completely disposed of until the liquidation of the entire mortgage—the trustee, it was alleged, had *converted* it (21), and in his complaint he went into the whole history of the investment both before and after the release (S 223-231). The alleged "conversion" consisted in a reduction of the mortgage interest rate, made after the release, the participation being one of $10,000 in a $110,000 mortgage (S 229). In his complaint Smith alleged that he held an assignment

from petitioner Helen V. Z. Anthony of the cause of action alleged in the complaint (S 230). Miss Anthony was quite evidently repudiating her release, although Smith's allegation of conversion, constituting part, but not all, of his "cause of action" alleged to have been acquired by assignment, was laid as of a time subsequent to the release.

How many more persons might turn up claiming to be assignees of causes of action relating to the trust estate respondent could not know. It accordingly promptly brought a proceeding in the Surrogate's Court, the tribunal in which the accounts of testamentary trustees are normally heard and settled, praying that the validity of its release be determined, and, as to the period falling without the term covered by the release, for the judicial settlement of its account, or for the whole period if the release itself were not effective (21).

This proceeding came duly on for trial, of which the customary notice of trial was given (S 271). Notices to produce specified documents on the trial were served by both sides (S 271-2). Petitioners had interposed an answer contending that Smith's suit involving one item of the account was a bar to the accounting proceeding (S 71-7), and petitioners urged this defense at the outset of the hearing (S 81-92). It was overruled, the trial proceeded (S 92) and final decree was rendered by the Surrogate's Court, approving and settling the trustee's account and finding the release in all respects valid (S 4-14; *Matter of James*, 173 Misc. 1042). On appeal this decree was affirmed by the Appellate Division (262 App. Div. 703) and by the Court of Appeals (287 N. Y. 328). A motion for reargument, advancing the constitutional claims now set forth, was made and denied (287 N. Y. 754). The present petitioners made an application to this court for certiorari on the same constitutional grounds, denied by this court (*sub nom. Anthony* v. *United States Trust Co.*, 315 U. S. 822).

It should be noted that as to all matters occurring after the final delivery of the release the Surrogate's Court held that its jurisdiction did not extend, and the decree left

undetermined, so far as that proceeding was concerned, everything occurring after that date (S 14). Petitioner Smith still had his "conversion" action for whatever it might be worth, for among the things thus left undecided, being alleged to have occurred subsequent to the period covered by the accounting decree in the Surrogate's Court, was the alleged "conversion" claimed to have been wrought by the reduction of the interest. The case whereof certiorari was then sought was thus, as is the present case, an ordinary judicial proceeding, wherein all the present petitioners were brought in by service of process or voluntary appearance, where they all joined in an answer, received and served notice of trial and where the case proceeded to trial and judgment.

Of such a judicial determination, how might it be contended that any one had been deprived of the due process of law guaranteed by the United States constitution? No such idea was ever voiced by counsel until the decree of the Surrogate's Court had been rendered and affirmed by the intermediate court and the court of last resort.

Petitioners' alleged constitutional question, now presented on this application, thus has to do with an altogether separate and distinct judicial proceeding; namely, a proceeding some years ago in the Surrogate's Court for the judicial settlement of the account of the present plaintiff in an antecedent period and in an altogether separate capacity, that is as testamentary trustee. That antecedent period ended with the termination of the present plaintiff's title as testamentary trustee. On June 8, 1936, the date at which the present accounting starts, the antecedent accounting in the Surrogate's Court ended, resulting in a decree judicially settling plaintiff's account for that period, that is to June 8, 1936 (*Matter of James*, 173 Misc. 1042). The present action has nothing to do with plaintiff's administration, in another capacity, during the antecedent period covered by the Surrogate's Court proceeding. One began precisely where the other ended. If petitioners had been exposed to a denial of due process of law in the Sur-

rogate's Court proceeding, correction was to be sought in the review of the decree in that proceeding. And in fact the decree has as we have said been subject to the most exhaustive review. Both the state courts and this court have become fairly familiar with the curious "constitutional" question so vociferously and with such iteration presented to one tribunal after another. With slight variance of phraseology, it is these contentions that are now advanced as to the basis for a review in this court of the judgment in the present action.

Were it necessary to discuss again these familiar "constitutional" contentions of petitioners we should be glad to do so. We have argued them at length in all five courts. But the extraordinary thing about the present attempted review is that it is actually founded on the claim that these contentions, argued, reargued, overruled and again and again overruled in another proceeding, may again be advanced to impugn the judgment in an altogether separate and distinct action.

Our present judgment in no way depends on the antecedent decree of the Surrogate's Court. Its validity and correctness would not be in the least affected had that judgment been a complete nullity, or indeed, had it never existed.

In their own pleading in the case at bar, their amended and supplemental answer, petitioners propounded their claim under the constitution, asserting in paragraph Ninth (14-15) that "contrary to the due process provision of the Fourteenth Amendment of the Constitution of the United States *the said Surrogate's Court* proceeded," etc. Even were there any basis for such contention, this would reveal no constitutional question involved in the present case. The judgment whereof certiorari is now sought is in no way founded on the decree of the Surrogate's Court. The accounting involved in this action was one to whose judicial settlement we were entitled wholly irrespective of anything in the Surrogate's Court proceeding. Even had that pro-

ceeding been wholly a nullity and all its process void, we should nevertheless have been entitled to the judicial settlement of our account for the period not covered by the Surrogate's proceeding. Our administration of the property in our present fiduciary capacity was initiated not as the result of the Surrogate's Court proceeding, but by the expiration of the testamentary trust. Even the determination made by the judgment now sought to be reviewed, that defendant Anthony was bound by the terms of the certificate of participation delivered to and accepted by her, which is the adjudication most bitterly attacked, was an adjudication made by the court itself in the present action, not a simple adoption of an adjudication rendered in another action. The court said (26):

> "Just as Surrogate Foley has held her bound and concluded by the other parts of the closing out of the testamentary trust, *I find her bound* and concluded by that provision of the instrument which she accepted as her muniment of title;"

a ruling manifestly correct but whose correctness or incorrectness would in no event present any constitutional question.

So far as we can make out from the confused verbiage of petitioners' forty-page brief, the alleged denial of due process of law consisted of

> (1) Overruling, in another proceeding in another court, defendants' (the present petitioners') contention that because they had interposed an answer denying the power of the court to give the petitioner in that proceeding (the present respondent) the relief prayed, therefore on overruling that preliminary contention the court should not have proceeded to try the case on the merits. This of course confers no right to certiorari. Petitioners were fully heard on that contention and pursued it through two appeals, and made an unsuccessful application for certiorari

here, and had due process of law to the full. Had they been right in their contention, they would have been entitled to relief without invoking the constitution and if in overruling their contention the court had committed error it would have been an error of law presenting no constitutional question. The contention was in any event absurd on its face, and the ruling was made not in the present suit but in a wholly different proceeding, in respect to which this court has already refused certiorari.

(2) So also of the contention that pendency of the petitioners' conversion action was a bar to the maintenance of this action. On this contention defendants have been fully heard in all the courts. The contention presented no constitutional question. That decision was correct, but even if it had been wrong it would have involved no denial of due process.

As a matter of law the decision of the Surrogate's Court, and the similar but independent decision of the Supreme Court in the case at bar were right; *Nat. Fire Ins. Co.* v. *Hughes*, 189 N. Y. 84; the Surrogate's opinion itself, *Matter of James* (173 Misc. (N. Y.) 1042) and the decision in the present case (20-30). As the Surrogate's Court said (S 265-266; reported in *Matter of James*, 173 Misc. (N. Y.) 1042, 1044-5)):

"Apparently the plaintiff assumes that she is entitled as of right to a trial of the action by a jury. It would be a novel but disastrous departure if beneficiaries could bring separate actions at law for damages based upon alleged acts of negligence or other basis of surcharge against a fiduciary. Under the system of concentration of the disposition of all questions involved in the fiduciary's conduct, in an accounting or other appropriate proceeding in the Surrogate's Court or on the equity side of the Supreme Court, all such questions are determined with

> all of the parties before the court in an expeditious manner. The development of the jurisdiction of Chancery over accountings grew out of the dissatisfaction and delay resulting from the common-law action of account where the entire action was broken up into a series of separate trials and after the verdict in each trial the result was certified back to the auditor appointed to examine the account (*Matter of Beare*, 122 Misc. 519; aff'd 214 App. Div. 723). Delay and expense thereby resulted. That system long ago fell into disuse both in England and in this State. It was supplanted by the more effectual and speedy remedy under the concentrated jurisdiction of a court of equity (*Malone* v. *Saints Peter & Paul's Church*, 172 N. Y. 269, 276; *Matter of Raymond* v. *Davis*, 248 id. 67, 72)."

But even had it been wrong, it was a decision rendered on an issue specifically raised, in a proceeding whereof the court had jurisdiction of all the parties and both the present petitioners appeared and participated in the trial. After hearing them the court held that the pendency of Smith's action was no bar to the accounting proceeding. If this had been error it would have been an error of law in deciding the case and not a denial of due process of law. The conception of denial of the due process of law guaranteed by the United States constitution seems never to have entered counsel's mind till after the affirmance.

> "It is firmly established that when parties have been fully heard in the regular course of judicial proceedings an erroneous decision of the State court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States."
>
> Bonner *v.* Gorman, 213 U. S. 86, 91.

The record reveals no error; least of all does it reveal lack of due process of law.

III

Costs should be awarded

Although costs are not ordinarily awarded on a denial of certiorari, the statute (Judicial Code, Sec. 237; U. S. Stat. Ann.; "Judicial Code," Sec. 344) provides that where there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs. We respectfully suggest that this is a strikingly appropriate case for the exercise of this salutary power. Unfounded as the previous application was, the present application is even more indefensible and injustice is done if its result is to impose on a fiduciary the expense and delay of such a manifestly unjustifiable application, the culmination of four years of an utterly futile and vexatious attempt to capitalize a nuisance value. An allowance of $250 would be within the spirit and letter of the statute, and we respectfully ask the court to consider whether its allowance is not one suggested by the plainest considerations of justice. ~~This court has granted allowances in cases of petitions of certiorari to review~~ judgments of ~~state courts~~ (*e. g.* in *Union Ry. Co.* v. *Jensen*, 289 U. S. 761, where $500 was allowed).

The petition for certiorari should be denied

All of which is respectfully submitted.

April 25, 1944.

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